

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KAZUTO TAKEDA dba EBISU
MARKET,

Plaintiff and Appellant,

v.

AKIYAMA TSUKEMONO
CALIFORNIA, INC., et al.,

Defendants and Respondents.

B213462

(Los Angeles County
Super. Ct. No. YC056502)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob T. Hight, Judge. Affirmed.

Law Offices of Robert W. Cohen and Robert W. Cohen, for Plaintiff and Appellant.

Law Offices of Richard A. Kolber, Richard A. Kolber, Elizabeth L. Bradley, and Pamela J. Bille, for Defendant and Respondent.

Plaintiff Kazuto Takeda appeals from the order vacating his default judgment against defendant Makoto Miyahara. We hold that the trial court acted within its discretion in granting Miyahara equitable relief from the judgment, and affirm.

FACTS AND PROCEDURAL HISTORY

Kazuto Takeda owns Ebisu Market and for many years purchased Japanese pickled products known as tsukenomo from Akiyama Tsukenomo California, Inc. (the supplier). Takeda sued the supplier and its long-time deliveryman, Makoto Miyahara, alleging that over the course of several years Miyahara inflated the amount of goods Takeda needed to order, placed an order with the supplier for a lesser amount, and pocketed the difference, totaling more than \$126,000.¹

Miyahara was served with the complaint on January 8, 2008. On February 21, 2008, Takeda served Miyahara with a notice of request to enter his default, and the default was entered on February 25, 2008. Nevertheless, on March 3, 2008, Miyahara's answer was accepted for filing by the court. Seven months later, on October 15, 2008, Takeda filed his request for entry of default judgment, and a judgment for nearly \$166,000 was entered on October 22, 2008. Miyahara, who had been representing himself, hired counsel and, on October 28, 2008, filed a substitution of attorney and a motion to vacate the default judgment under Code of Civil Procedure section 473 on the grounds of mistake, surprise, and excusable neglect.²

Section 473 motions must be made within six months of the entry of default. (See DISCUSSION, § 1, *post.*) Takeda opposed the motion to vacate on that ground, and on the ground that Miyahara's neglect was not excusable. Miyahara's reply brief argued that

¹ Miyahara admits to committing theft, but in the opposite direction. According to him, he delivered all the items Takeda paid for, but reported to the supplier that he had delivered less, and pocketed the difference from the money Takeda gave him. Takeda dismissed the supplier without receiving any settlement payment because he believed Miyahara acted alone without the participation of, or ratification by, the supplier.

² All further section references are to the Code of Civil Procedure.

he was entitled to *equitable* relief from the default judgment due to the same factual circumstances, a remedy not affected by the statutory six-month deadline of section 473. Over Takeda's strenuous objection that the equitable relief issue could not be raised at that time, the trial court granted the motion to vacate under its equitable powers, based on a finding that excusable mistake prevented Miyahara from moving to vacate the default within the statutory six-month deadline. The facts relevant to this finding stem from the trial court clerk's office inadvertent acceptance of Miyahara's answer after his default was taken, combined with actions that made it seem as if Miyahara was still entitled to appear and defend himself.

The evidence showed that Miyahara went to a legal assistance center on February 20, 2008, to have his answer prepared and filed. Unknown to Miyahara, the center did not file the answer until March 3. In the interim, the notice of request to enter the default was filed and served and the default was entered. In April 2008, Takeda filed a petition for a writ of attachment against certain property owned by Miyahara. The motion did not mention that the default had been entered. Miyahara filed an opposition memorandum, which was accepted for filing.³ Takeda's reply mentioned in a footnote that Miyahara had no right to appear and oppose the motion because his default had been entered. Miyahara appeared at the hearing, and no mention of the default was made. Instead, the trial court denied the petition because it believed Takeda was required to show that his claim was based on a contract.

In June 2008, Takeda filed a petition for writ of mandate with this court, contending the trial court erred by concluding that his claim was not based on a contract pursuant to section 483.010. On June 20, 2008, we issued an order noting that the trial court had erred because a writ of attachment was proper where a defendant violated a legal duty to account for money improperly obtained from a plaintiff. Accordingly, we said we would issue a peremptory writ in the first instance unless the trial court issued the writ of attachment. After receiving that order, the trial court gave notice of a July 25

³ Miyahara was representing himself, but admits in a declaration that he had a lawyer prepare the opposition papers.

hearing concerning Takeda's petition for a writ of attachment. At that hearing, which Miyahara did not attend, the trial court issued the writ of attachment. Its minute order noted that Miyahara's previous opposition could not be considered because his default had been entered. Takeda prepared, and the trial court signed, a formal order granting the writ of attachment, but that order did not mention the existence or effect of the default. There is no indication in the record that Miyahara was ever sent a copy of the court's minute order, or the formal order. A default judgment for Takeda was entered on October 22, 2008, and six days later Miyahara filed the motion to vacate.

Takeda contends that Miyahara knew his default had been entered but did nothing until eight months later, meaning his conduct did not qualify for equitable relief from the default judgment. He also contends the trial court violated his due process rights by granting the motion under its equitable powers when that ground was not raised until Miyahara filed his reply papers in support of the motion to vacate.

1. *The Trial Court Did Not Abuse Its Discretion By Granting Equitable Relief from the Judgment*

Under section 473, subdivision (b), a party is entitled to seek relief within six months from an adverse order or legal proceeding on grounds of surprise, mistake, inadvertence, or excusable neglect. Even though Miyahara's motion to vacate was brought within days of the entry of judgment, it was still too late for relief under section 473 because it was brought more than six months after the entry of default. (*Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 970.) After that time, however, the trial court could vacate the judgment under its inherent equity power if the judgment was procured by extrinsic fraud or mistake. (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 314.)

Extrinsic mistake does not require proof of fraud or other misconduct by one of the parties. Instead, it exists when the excusable neglect of the defaulting party prevented him from appearing and defending the action. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 503.) Such relief is not available if the defaulting party was given

notice of an action but failed to appear, without having been prevented from participating in the action. Under this rule, Miyahara was required to satisfy three elements: (1) he had a meritorious case;⁴ (2) he can show a satisfactory excuse for not presenting a defense; and (3) he acted diligently to set aside the default once he discovered it. (*Ibid.*) There is a strong public policy favoring relief under a timely section 473 motion. However, after the statutory six months, the policy shifts in favor of the finality of judgments. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981-982.) Even so, we review the trial court's ruling under the abuse of discretion standard (*id.* at p. 981), and we will draw from the evidence all reasonable inferences in favor of that ruling. (*In re Estate of Carter* (2003) 111 Cal.App.4th 1139, 1154.)

Takeda contends the trial court abused its discretion because the evidence did not show any excusable neglect by Miyahara. He points to the following evidence: Miyahara did not try to file an answer until after the time to do so had passed; Miyahara admitted receiving notice that entry of default had been requested in late February 2008; Miyahara was notified that default had been entered and he had no right to participate by way of Takeda's May 2008 reply papers for a writ of attachment, his June 2008 petition to this court for a writ of mandate, and by the July 25, 2008, hearing where the trial court reversed itself and issued the writ of attachment; and Takeda's lawyer said in a declaration that during several meetings or conversations with Miyahara, he advised him of the entry and effect of the default.

Although this evidence would have supported an order denying Miyahara's motion to vacate, there is sufficient contrary evidence to justify the trial court's decision to vacate the default judgment. Even though Miyahara was late in preparing an answer to the complaint, he did so with the help of a legal assistance center one day before the notice of request to enter default was served, and five days before the default was entered. Despite assurances the answer would be promptly filed, Miyahara later discovered it had not been filed until March 3. Had the answer been filed when

⁴ This element has not been raised on appeal.

promised, the default could not have been entered. (*In re Brian W.* (1996) 48 Cal.App.4th 429, 434, fn. 3.) The legal assistance center's failure to file the answer in time to preempt the entry of default would have been grounds to vacate the default under a timely section 473 motion. (See *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855-856; *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 696.)

Despite entry of the default, the answer was allowed to be filed. A few weeks later, instead of moving to obtain a default judgment, Takeda sought a writ of attachment, which depended upon a showing of the probable validity of his claim *in advance of trial and judgment*. (§§ 483.010, subd. (a), 484.090, subd. (a)(2); *Commercial & Farmers Nat. Bk. v. Hetrick* (1976) 64 Cal.App.3d 158, 164.)⁵ Although Takeda's reply papers mentioned the default in a footnote, the trial court denied the petition for a writ of attachment on other grounds and the existence and effect of the default were not mentioned at the hearing or in the court's minute order. Miyahara could have easily concluded from this chain of events that whatever entry of default meant, it did not preclude him from participating in the action precisely because he had been allowed to file his answer and participate in the proceedings. Takeda's mention of the default in his petition for a writ of mandate might well have been seen as his repetition of a legal point that had no merit because of the preceding events. The default was not mentioned again until the July 25 minute order where the trial court issued the writ of attachment, but Miyahara did not attend that hearing and there is no indication in the record that he ever received a copy of the court's order. Takeda's request for entry of default judgment was served on Miyahara on October 10, 2008. Seven days later, Miyahara signed a substitution of counsel form for the law firm he had just hired, and 11 days later, his motion to vacate the judgment was filed. Miyahara denied that Takeda's lawyer ever talked to him about the entry of default or its legal effect. According to Miyahara, had he not been lulled into believing he was still allowed to defend the action back in April 2008, he would have hired counsel earlier to respond to the entry of default.

⁵ If Takeda had sought entry of judgment, instead of seeking a writ of attachment, he would have been able to execute on the judgment. (See, e.g., § 699.010 et seq.)

This was sufficient evidence to support the trial court's finding that Miyahara's failure to promptly seek relief from the entry of default was excusable mistake because Miyahara reasonably believed he was still allowed to participate in the action and defend against Takeda's claims. Takeda tries to avoid this conclusion by resort to the well-known rule that litigants who represent themselves are bound by the same rules applicable to lawyers (*Rappleyea v. Campbell, supra*, 8 Cal.4th at p. 1267), and that a lawyer's general ignorance of the law or failure to research is not a sufficient excuse. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611.) At issue in *State Farm* was a party's request for relief from his failure to file a cross complaint based on his lawyer's failure to properly research whether the cross complaint was compulsory and therefore needed to be filed at that time. Because no attorney affidavit of fault that would have justified automatic relief under section 473, subdivision (a), had been filed, the appellate court considered the issue under the rubric of the discretionary relief permitted by section 473, subdivision (b). While counsel's ignorance of the law is, in general, no excuse, the appellate court held the mistake was excusable in that instance due to the complexity of the legal issues involved. (*Id.* at pp. 612-613.)

We do not quarrel with the general principles that Takeda cites, but we find *State Farm* to be inapplicable here. Miyahara was not represented by counsel. He was a lay person who, as the trial court observed during the May 2008 hearing on the writ of attachment, had difficulty understanding English. His "ignorance" of the law – his failure to appreciate that the default meant he could not participate and defend the action – was fostered in part by the court's erroneous acceptance of his answer and by allowing him to file opposition and appear at the May 2008 hearing on the attachment petition. When the party's mistake comes about in this manner, a trial court could reasonably conclude that it would be unduly harsh and inequitable to deny him relief from the resulting default judgment.

Finally, Takeda contends the trial court erred because it applied the presumption in favor of granting relief and resolving claims on their merits that comes into play only during a timely section 473 motion, instead of applying the presumption in favor of

finality of judgments that is used in considering a motion for equitable relief after the statutory six-month deadline has passed.⁶ (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at pp. 981-982.) Assuming that error occurred, the trial court made factual findings concerning excusable neglect that we are able to apply under the correct policy presumption to determine that, had the trial court applied the correct standard, it is reasonably probable it would have reached the same result. Accordingly, any error was harmless. (*Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1504, fn. 11.)

2. *Reliance on Ground of Equitable Relief*

Miyahara's motion was based solely on section 473, subdivision (b), asserting he was entitled to relief due to his excusable neglect, among others. When Takeda's opposition pointed out that relief was not available under section 473 because the default was entered more than six months earlier, Miyahara's reply papers argued that the same facts on which he relied in his moving papers entitled him to equitable relief. Takeda objected at the hearing to consideration of the equitable grounds because they were not raised in the moving papers. He contends on appeal that the trial court erred because it violated both section 1010, which requires that the grounds for a motion be raised in the notice of motion, and his constitutional due process rights.

Although one decision – *Castagnoli v. Castagnoli* (1954) 124 Cal.App.2d 39, 41 – has held that relief from default may not be given on equitable grounds unless raised in the moving papers, two others have taken a contrary view. (*Davis v. Thayer* (1980) 113 Cal.App.3d 892, 911; *Marianos v. Tutunjian* (1977) 70 Cal.App.3d 61, 64.) We agree with the latter two decisions, especially when the factual basis for equitable relief was identical to that raised in the motion as a ground for relief under section 473. Finally, even if due process error occurred, it is subject to harmless error analysis. (*Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921, 928.) First of all, Takeda has not explained on appeal how in fact he was prejudiced. Nor did he ask the trial court

⁶ Both the minute order and the reporter's transcript show that the trial court did rely on the incorrect presumption.

for additional time to respond to the equitable argument. Given the trial court's view of the evidence, and our conclusion that the evidence is sufficient to support a finding of excusable neglect, we hold that even if the matter were reargued, a different result is not reasonably probable. Accordingly, any error was harmless.

DISPOSITION

The order vacating the default judgment is affirmed. Respondent shall recover his appellate costs.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.